IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MUSTAFA-EL K.A. AJALA
formerly known as DENNIS E. JONES-EL,

Plaintiff,

v.

WILLIAM SWIEKATOWSKI and PETER ERICKSEN,

Defendants.

OPINION and ORDER

13-cv-547-bbc

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Pro se prisoner Mustafa-El K.A. Ajala brought this case under 42 U.S.C. § 1983, challenging various conditions of his confinement. All of plaintiff's claims were dismissed except one, which was plaintiff's claim that defendants William Swiekatowski and Peter Ericksen (officials at the Green Bay Correctional Institution, where plaintiff was housed at the time) withheld plaintiff's prescription eyeglasses for two months, in violation of the Eighth Amendment. A trial was held on June 9, 2015 and the jury rendered a verdict in favor of defendants.

Now before the court is plaintiff's motion under Fed. R. Civ. P. 59 for a new trial on the ground that the court allowed defendants to use a peremptory strike to keep an African American off the jury, in violation of the equal protection clause of the Fourteenth Amendment. Dkt. #79. After considering the parties' briefs and reviewing the evidence, I am persuaded that I erred in allowing defendants to strike the prospective juror. Although

defendants provided a plausible explanation for striking the juror, the veracity of that explanation is called into question in light of other evidence, including defendants' treatment of a similarly situated white prospective juror and defendants' initial decision to strike *all* nonwhite prospective jurors on the venire panel. Accordingly, I am granting plaintiff's motion for a new trial.

OPINION

It is well established that a person may not be excluded from a jury because of her race, a rule that applies to either a criminal trial, Batson v. Kentucky, 476 U.S. 79, 86-87 (1986), or a civil trial. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). Race discrimination in jury selection not only violates a juror's right to equal protection of the laws and a litigant's right to a fair trial; it also undermines the entire community's confidence in our system of justice. Batson, 476 U.S. at 87-88.

In this case, plaintiff says that defendants used a peremptory strike to exclude Prospective Juror No. 2 because she is an African American. (The prospective juror's number corresponds to the list of the members of the venire panel docketed under seal at docket no. 86.) Plaintiff, who is also an African American, raised his objection during jury selection, but I accepted defendants' explanation for excluding Prospective Juror No. 2 because the father of her daughters had been incarcerated.

The Supreme Court has set forth a three-part test for trial courts to consider when a party raises what the case law refers to a "Batson challenge" during trial:

> First, the opponent of a peremptory challenge must make out a prima facie showing of race discrimination in selection of the venire. If this showing is made, the burden of production shifts to the proponent of the strike to offer a race-neutral explanation. Then the court must determine whether the opponent of the strike has proved purposeful discrimination.

Harris v. Hardy, 680 F.3d 942, 949 (7th Cir. 2012). However, once the party exercising a peremptory strike "has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." Hernandez v. New York, 500 U.S. 352, 359 (1991). Accordingly, I will proceed directly to the final inquiry, which is whether all the evidence supports a finding of race discrimination.

As noted above, defendants' explanation for excluding Prospective Juror No. 2 relates to statements she made about her relationship with an incarcerated person. In particular, during voir dire, each prospective juror on the venire panel was asked whether she, a family member or a close friend had been incarcerated and whether the prospective juror had ever visited a jail or prison. Tr. Trans., dkt. #82, at 26-27. Prospective Juror No. 2 stated that the father of her daughters "had been in and out since he was 17," Tr. Trans., dkt. #82, at 26, and that she had visited him while he was there, id. at 27.

When the court questioned defense counsel about his reasons for excluding Prospective Juror No. 2, counsel stated that he was concerned about "the prison and jail experience of the father of her children and the visiting him in jail." Id. at 34. He later added that he "had concerns based on . . . that experience of visiting someone or having contact with someone in prison or jail . . . [T]he view of the system . . . sometimes can be

harmful to the interest of my clients from the standpoint of prisons and jails are harsh places. They can be, especially to a person who is not familiar with that, to the average citizen they can look rather harsh." Id. at 35.

One threshold problem with defendants' explanation is that they did not seek to ask Prospective Juror No. 2 any followup questions about her view of prison conditions or whether she believed they were too harsh. In fact, Prospective Juror No. 2 stated without qualification that the experience of her daughters' father would not affect her ability to be impartial, id. at 26, and she did not raise her hand in response to another voir dire question whether any of the prospective jurors believed that prisoners are treated too harshly, id. at 30. This undermines the reasonableness of defendants' stated belief that Prospective Juror No. 2 would be unfairly sympathetic to plaintiff's situation.

That being said, when the plaintiff is a prisoner suing about his prison conditions, it is reasonable to believe that a prospective juror's judgment could be affected by the experiences of a loved one who was incarcerated. Davidson v. Gengler, 852 F. Supp. 782, 788 (W.D. Wis. 1994) ("[S]triking a black juror because of a familial relationship to individuals involved in the criminal justice system is a neutral reason to strike a juror."). See also United States v. Hendrix, 509 F.3d 362, 370 (7th Cir. 2007) ("[Having] relatives in prison . . . is a valid and race-neutral basis for the strikes. Jurors with relatives in prison may sympathize with a defendant, or have feelings of animosity against the prosecution."). If the evidence were limited to the statements discussed above, I would have no difficulty denying plaintiff's motion.

However, defendants' use of peremptory strikes is more suspicious when viewed in context. First, as plaintiff points out, defendants did not strike Prospective Juror No. 5, a Caucasian woman who stated that she had visited a relative who was incarcerated, even though the same rationale defendants offered for striking Prospective Juror No. 2 would apply to her as well. Id. at 82. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El v. Dretke, 545 U.S. 231, 241 (2005). See also id. at 248 ("On the face of it, the explanation [for striking a black juror] is reasonable from the State's point of view, but its plausibility is severely undercut by the prosecution's failure to object to other panel members who expressed views much like [the black juror's].").

In their brief in opposition to plaintiff's motion, defendants argue that Prospective Juror No. 5 is not similarly situated to Prospective Juror No. 2 because Prospective Juror No. 5's relative was her step nephew and she had visited him only once approximately ten years earlier. Thus, defendants say that the two prospective jurors "had significantly different relationships with the incarcerated individual they visited." Dfts.' Br., dkt. #83, at 6. In addition, defendants say that Prospective Juror No. 2 "stated that she had visited her daughter's father in jail on several occasions," but Prospective Juror No. 5 "stated that she had visited her step nephew on one occasion." Id.

There are a number of problems with this argument. To begin with, defendants did not rely on these alleged differences between Prospective Juror No. 2 and Prospective Juror

No. 5 during the colloquy with the court. Miller-El, 545 U.S. at 245-46 (government's delay in identifying particular reason for striking black juror is evidence of pretext). Second, Prospective Juror No. 2 denied that she was close to the father of her daughters, stating that she did not "have much contact with him anymore." Tr. Trans., dkt. #82, at 26. In contrast, Prospective Juror No. 5 did not try to distance herself from her nephew. Again, defendants did not request followup questions to explore the scope of any continuing relationship these prospective jurors had with the incarcerated individuals or what effect it might have on their ability to be fair. Miller-El, 545 U.S. at 246 (questioning government's explanation that it struck black juror because his brother had been incarcerated; prospective juror "indicated he was not close to his brother . . . and the prosecution asked nothing further about the influence his brother's history might have had on [the prospective black juror], as it probably would have done if the family history had actually mattered").

Third, defendants are misrepresenting the record by suggesting that Prospective Juror No. 2 stated that she had more frequent visits to a prison or jail than Prospective Juror No. 5. Prospective Juror No. 5 said that her nephew was in jail for "awhile" about ten years ago and that she visited him while he was there. She did not say how many times she visited him. Although Prospective Juror No. 2 stated that the father of her daughters had been "in and out" of jail, she did not say that she had been visiting him all that time and she did not say how often she visited him or how many times she did so. She stated only that "maybe eight years ago when I was with my daughters' father, I visited him." Tr. Trans., dkt. #82, at 27. Again, defendants did not ask for clarification.

Despite all these reasons to question defendants' explanation, I cannot say that it would be unreasonable to believe that the experiences of your daughters' father would have a more significant effect on your ability to be fair and impartial than those of a step nephew. It was for that reason that I accepted defendants' explanation for the strike during voir dire.

However, I believe that I erred in failing to look at defendants' decision to strike Prospective Juror No. 2 in the context of their other peremptory strikes. In this case, each side was allowed three peremptory strikes. Of the 14 members of the venire panel, only three of them were not Caucasian (Prospective Jurors Nos. 1, 2 and 10), yet defendants used each of their three peremptory strikes to remove each of the minority prospective jurors. When plaintiff raised this issue, defendants did not try to justify the decision. Instead, counsel admitted that he "had no basis" for striking Prospective Juror No. 1 and Prospective Juror No. 10. Tr. Trans, dkt. #82, at 35. His only explanation was that "this is a great jury pool and . . . I had to mark someone down." Id. Ultimately, defendants agreed to withdraw their objections to Prospective Juror No. 1 and Prospective Juror No. 10 rather than justify their choice. Id. at 36.

It is troubling that defendants' initial choice was to remove all non-white persons from the jury, particularly because they offered no reasons for doing so. United States v. Stephens, 421 F.3d 503, 512 (7th Cir. 2005) ("[A] pattern of strikes against jurors of a particular race may give rise to an inference of discrimination. Such a pattern can be evident where a prosecutor uses peremptory challenges to eliminate all, or nearly all, members of a particular race."). If defendants' choice had been as random as they suggest, the chances

are slim that they would not have excluded at least one white juror. Defendants' actions are even more suspicious in light of the fact that plaintiff is an African American and both defendants are Caucasian. Stephens, 421 F.3d at 515 ("[The] inference of discrimination is furthered when considering the context of the strikes as a whole. Although the crime in this case was wire fraud and did not involve issues of race, the defendant was African-American and the witnesses were all Caucasian.").

What's worse, defendants' explanation that they "had to mark someone down" does not hold water. If defendants were struggling to identify prospective jurors to strike, why didn't they strike Prospective Juror No. 5? Even if I accept defendants' argument that they had more reason to challenge Prospective Juror No. 2 than Prospective Juror No. 5, the difference between the two was slight. Certainly, it would have made more sense to strike a prospective juror who had an incarcerated relative than to strike a juror for no reason, which is what defendants say happened. Further, not only did Prospective Juror No. 5 have an incarcerated relative, she also had been a plaintiff in a tort lawsuit involving a company's alleged failure to compensate her for medical expenses. Tr. Trans, dkt. #82, at 18. Because plaintiff was seeking damages for a medical issue, this was another reason that Prospective Juror No. 5 may have empathized with plaintiff's situation. For these reasons, defendants' explanation for their peremptory strikes simply is not plausible. Harris, 680 F.3d at 949 (credibility of explanations can be evaluated "by how reasonable, or how improbable, the explanations are"; "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.") (internal quotations omitted).

Defendants rely on Severtson v. Hannan, 124 F.3d 205 (7th Cir. 1997) (unpublished), for the proposition that "a party is not required to employ consistency when choosing to strike a juror based on the juror's experiences." Dfts.' Br., dkt. #83, at 6. I need not consider Severtson because it has no precedential or even persuasive authority. Circuit Rule 32.1(d) ("No [unpublished] order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding."). In any event, to the extent that Severtson suggests that disparate treatment of similarly situated jurors is not evidence of discrimination, that holding was overruled by Miller-El, 545 U.S. 231.

In sum, I conclude that, in light of all the evidence, the inference of discrimination is simply too strong to uphold the decision to strike Prospective Juror No. 2. "[W]hen a violation of equal protection in jury selection has been proven, the remedy is a new trial, without the need for any inquiry into harmless error or examination of the empaneled jury." Winston v. Boatwright, 649 F.3d 618, 627 (7th Cir. 2011). Accordingly, I am granting plaintiff's Rule 59 motion for a new trial.

ORDER

IT IS ORDERED that

1. The motion for a new trial filed by plaintiff Mustafa-El Ajala, dkt. #79, is GRANTED.

2. The clerk of court is directed to set a conference before Magistrate Judge Stephen

Crocker to determine a new trial date and related deadlines.

Entered this 15th day of October, 2015.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge